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No. 357

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO, *Petitioner*,

v.

HOOSIER CARDINAL CORPORATION, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The opinion of the District Court dismissing this suit under Section 301 of the Labor-Management Relations Act was filed on November 12, 1964, and appears at R. 12. The opinion of the Court of Appeals for the Seventh Circuit, issued on June 4, 1965 (346 F. 2d 242), appears at R. 24.

Jurisdiction

The opinion and judgment of the United States Court of Appeals for the Seventh Circuit, affirming the District

Court's dismissal of petitioner's suit, were entered on June 4, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1). The petition for certiorari was filed on July 22, 1965 and was granted on October 11, 1965. 86 Sup. Ct. 87.

Questions Presented

1. Whether uniform federal timeliness standards rather than the differing norms of state statutes of limitations control suits for the enforcement of collective bargaining agreements under Section 301 of the Labor-Management Relations Act.

2. Whether, if state limitations are controlling, a Section 301 suit to enforce the vacation pay provisions of a written collective bargaining agreement is, for purposes of choosing the applicable state limitation, to be treated as a suit resting on that written agreement or on oral contracts of hire between the employees and the employer.

Statute Involved

Section 301 of the Labor-Management Relations Act, 61 Stat. 156, 29 U.S.C. §185, provides in part:

> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jursdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
>
> "(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the

acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States . . . ."

Statement

On September 1, 1955 the International Union, UAW, and its Local 145, collective bargaining representative for the employees of the Hoosier Cardinal Corporation of Evansville, Indiana, entered into a three year collective bargaining agreement with the company (Complaint, Exhibit "A," R. 5). Among the usual provisions common to such labor-management agreements was Article VIII governing "Vacations." That Article, providing that "vacations shall be granted on the following basis," set forth four categories of employees with differing formulas for accumulation of vacation pay. Among the provisions of the Article was a clause (R. 7) that "employees who qualified for vacations in the previous year and whose employment is terminated for any reason before the vacation is taken will be paid that vacation at time of termination."

On June 1, 1957, the company terminated the employment of more than one hundred workers whose employment and vacation pay were controlled by the union-company agreement of 1955; but the company did not at that time or thereafter pay to the terminated employees their accumulated vacation pay as required by Article VIII of the agreement (Complaint, Paragraph 7, R. 4). Eight months after this refusal to honor the agreement, on February 21, 1958, the union's attorneys filed a class action for the employees against the company in the Superior Court of Vanderburgh County, Indiana. *Johnson* v. *Hoosier Cardinal Corp.*, Cause No. C-7284 (*infra*, Appendix p. 1). The suit sought recovery of vacation pay under Article VIII of the collective bargaining agreement

between the union and the company (*infra,* Appendix p. 2). At that time, this Court's ruling in *Association of Westinghouse Salaried Employees* v. *Westinghouse Elec. Corp.,* 348 U.S. 437, precluded resort to the federal courts for collection of the vacation pay due to the employees under the collective bargaining agreement with the company.

On January 21, 1959, the Superior Court of Vanderburgh County ruled that the class action was improper under Indiana law (*infra,* Appendix pp. 9-12). Thereafter, each of the former employees assigned his claim to union representative Frank Kavanaugh, who, on August 7, 1959, filed an amended complaint in the same action in the nature of a representative claim for all the employees (*infra,* Appendix p. 13). However, on September 23, 1959, the Court (*infra,* Appendix pp. 16-18) sustained a demurrer to the amended complaint on the ground that the assignment method of suit is improper under Indiana law. Thereupon, by further amended complaints (*infra,* Appendix pp. 19-26), the union's attorneys reinstituted the original class action. Upon demurrer to the propriety of the suit as a class action (*infra,* Appendix pp. 27-30) the Indiana Superior Court entered a final dismissal of the action on June 3, 1960 (*infra,* Appendix pp. 31-32). An appeal was taken to the Appellate Court of Indiana, and on April 18, 1963, that court affirmed the dismissal of the suit (see *Johnson* v. *Hoosier Cardinal Corp.,* 134 Ind. App. 477, 189 N.E. 2d 592).

Meanwhile, in *Smith* v. *Evening News Ass'n,* 371 U.S. 195, this Court had effectively overruled its earlier *Westinghouse* restriction, and opened the door to Section 301 suits in federal court for such employee benefits under collective bargaining agreements as the vacation pay involved in this case. Accordingly, on April 8, 1964, eleven months after the Indiana dismissal became final, the union filed this Section 301 action in the United States District Court

for the Southern District of Indiana for the recovery of the vacation pay due the former employees of the company.

The company interposed the defense of statute of limitations (R. 8) urging that nearly seven years had passed since the employee terminations had vested the vacation pay rights claimed under the contract, and pleading the Indiana Act of 1881 (Spec. Sess.) Ch. 38, Sec. 37 (Burns' Ind. Stat. Ann. § 2-601), which provides that suits must be commenced within six years on "contracts not in writing." The company asserted that the union's suit for wages due, while nominally based upon the vacation pay provisions of the written collective bargaining agreement, was actually grounded upon the individual oral hiring agreements between the employees and the company. As a suit "in effect . . . under the separate individual [oral] employment contracts of the former employees" (defendant's trial court brief, p. 4), the company urged that the 6-year statute rather than the 20-year Indiana statute governing suits on "contracts in writing" (Burns' Ind. Stat. Ann. § 2-602) applies to this action.

On November 12, 1964, the District Court filed an opinion (R. 12) upholding this company contention, and dismissing the union's complaint. On appeal to the Court of Appeals for the Seventh Circuit, the union's principal argument was that Indiana statutes of limitations do not apply to and cannot bar a federal suit under Section 301. On June 4, 1965, the court below issued its opinion (R. 24) holding that the Indiana statutes of limitations govern the time for commencing this Section 301 action. In reaching that result, the court below holds that the suit is "actually a case by an agent [the union] to enforce the rights of individual workmen," and that "the question of whether vacation pay is due the workmen here involved is a question of state law." And the court also upholds the dis-

missal of the suit under the six-year Indiana statute governing "contracts not in writing," on the theory that although the vacation pay provisions of the collective bargaining agreement are in writing, the action is actually "based upon the [oral] contracts of employment between the individual employees and defendant" (R. 26-28).

This Court has granted review on the question of the applicability of local limitations to Section 301 suits and on the question whether, assuming applicability of local limitations, Section 301 actions may be viewed for the purpose of choosing the appropriate state limitation as if predicated on individual contracts of hire rather than the written collective bargaining agreement.

Summary of Argument

A

This Court should bar application of differing state standards, and instead prescribe appropriate and uniform federal limitations for Section 301 actions. Where, as here, Congress has set no limitations period for the assertion of a federal statutory right, this Court has sometimes looked to analogous state limitations to provide a federal standard; but this Court has *declined* to adopt state limitations where to do so would interfere with federal supremacy or with a necessary uniformity in the vindication of uniquely national rights. This Court having required under Section 301 what it has characterized as "a uniform body of federal substantive law" (*Smith* v. *Evening News Ass'n*, 371 U.S. 195, 200), it becomes clear that the applicable statute of limitations must also be a matter of uniform law, without state-by-state differentiation.

Application of state statutes of limitations to Section 301 actions would result in aggravated diversity, since limita-

tions periods for contract actions provided in the several states vary from as little as 60 days to as long as 20 years. Not only would the adoption of such diverse state limitations promote disharmony and forum shopping, but extraordinary difficulties would also arise with respect to antiquated state labor law theories which would tend to creep back into Section 301 through the statute of limitations loophole. Under these circumstances, we cannot believe that this Court would adopt differing state limitations under Section 301 and thus sanction the diversity which it so recently avoided in *Burnett* v. *New York Central R.R.*, 380 U.S. 424, by fashioning its own FELA limitations-tolling norm. Especially is diversity to be avoided here where there are established principles available for fashioning uniform timeliness rules for each of the major categories of Section 301 actions.

B

This suit was timely filed under the suggested federal limitations standard. The same tolling principle this Court adopted in *Burnett* necessarily applies to limitations standards this Court adopts for Section 301 actions. In view of the five-year state court litigation, the suit at bar was timely filed under any limitation period not less than two years in duration; by application of the *Burnett* rule, the limitations in this case ran for only eight months before tolling commenced and eleven months after it ended. Such a tolling is particularly appropriate in the present case where it was this Court's now-overruled *Westinghouse* doctrine which occasioned the protracted and unsuccessful effort to invoke the Indiana jurisdiction.

C

This suit was timely filed even if the Indiana limitations should apply. The court below agreed that the Indiana limitation applicable to suits on "contracts in writing" is 20 years, but it rejected that period in favor of the Indiana 6 year limitation applicable to "contracts not in writing." Holding that the present action was one based on oral contracts of hire rather than the written collective bargaining agreement, it applied the shorter state statute of limitations.

But, even if local limitations apply, the choice of the applicable limitation is nevertheless a federal question both under this Court's general limitations authorities and its Section 301 decisions. If the state statute of limitations is to be absorbed in federal law, it cannot be that the choice of the state statute to be federally absorbed can rest upon principles contrary to the substantive law of the federal statute upon which the local limitations is judicially engrafted. This Court has stated in terms dispositive of the present question that under Section 301 "incompatible doctrines of local law must give way to principles of federal labor law." *Local 174, Teamsters Union* v. *Lucas Flour Co.*, 369 U.S. 95. This being a suit on the written collective agreement rather than on oral contracts of hire, Indiana's 20-year limitations for suits on a written contract would obviously apply.

Argument

The principal issue presented for this Court's resolution is whether uniform federal limitations standards rather than the differing local limitations shall govern suits under Section 301 of the Labor-Management Relations Act. In Point I of the Argument we urge the Court to bar the application of differing state standards and instead prescribe appropriate and uniform federal limitations governing

Section 301 actions. In Point II we make clear that this suit was timely filed under the suggested federal standard. In Point III we demonstrate that this action was timely filed even should the Indiana limitations apply. But before addressing ourselves to these points we believe it appropriate preliminarily to review the manifest invalidity of the "state cause of action" theory upon which the court below rested its decision in the instant case.

Whichever way this Court may resolve the central question pending before it, it is clear that the rationale of the court below is wholly unacceptable both as a predicate for the rejection of uniform federal limitations under Section 301 and as a basis for the result reached below. The lower court opines that while this suit is brought on the vacation pay provisions of the collective bargaining agreement, the action is "actually" grounded on the individual contracts of hire between workers and the company (R. 26). From that premise the court finds that the action is only one by the union as an agent suing under subsection (b) of Section 301 and *not* subject to subsection (a). And the capstone of this syllogism is the court's conclusion that the contract violation alleged in the suit is purely "a question of state law," which Congress has directed federal courts to adjudicate without recourse to any federal substantive law or uniformity on such matters as limitations (R. 26-27).[1]

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[1] The court below seeks in part to support its "state cause of action" ruling on the ground that the Complaint in the District Court "seeks not only wages due for vacation pay, but also statutory penalties and attorneys' fees allowable by an Indiana statute, and thus frankly recognizes the case as a state action." But the lower court's observation that petitioner recognized the case as a state action because it pleaded certain state statutes in the Complaint, is without foundation. The Complaint (R. 3) avers that it is "brought by the plaintiff under the provisions of Section 301 of the Labor Management Relations Act," and that "Jurisdiction of this cause is vested in this Court by virtue of said Act . . ." The concluding recitation in the Complaint (R. 5) of Indiana

Of course, the central and crucial mistake in the lower court's rationalization is its view that this suit is "based on the contracts of employment between the individual employees and defendant," rather than on the provisions of the collective bargaining agreement. True, if there had been no employees there would have been no collective bargaining agreement. But to say that because the vacation pay provisions of the bargaining agreement secured employee rights the suit is "based on" the individual contracts of hire, rather than on the collective bargaining agreement, is to affirm *generally* that Section 301 actions are not based upon collective agreements. After all, with but few exceptions (e.g., the "check-off"), the vast majority of collective bargaining agreement provisions do secure employee rights, not union rights.

In any event, it is too late in the day to make the collective agreement subservient to the "individual contracts of employment" and transmute a Section 301 suit into a common-law action for wages. It was the same concept of rights arising from "separate hiring contracts between the employer and each employee" which troubled this Court in *Association of Westinghouse Salaried Employees* v. *Westinghouse Elec. Corp.*, 348 U.S. 437, 464, and which the Court recently rejected in *Smith* v. *Evening News Ass'n*, 371 U.S. 195, 198-200. *Evening News* made clear that no immutable line of demarcation exists between individual employee rights and union rights inhering in collective bargaining agreements:

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statutes providing for double unpaid wages, merely safeguards the benefit of any additional state *remedy*, this Court not yet having clarified the extent to which state remedies survive in Section 301 actions. In any event, a Section 301 suit could not become a state cause of action by virtue of a plaintiff's erroneous belief in that regard. This Court having ruled that Section 301 invokes a "body of federal substantive law" (*Smith* v. *Evening News Ass'n*, 371 U.S. 195, 200), a plaintiff's contrary characterization of his federal action would have no operative effect.

> "The concept [of *Westinghouse*] that all suits to vindicate individual employee rights arising from a collective bargaining contract should be excluded from the coverage of § 301 has thus not survived. The rights of individual employees concerning rates of pay and conditions of employment are a major focus of the negotiation and administration of collective bargaining contracts. Individual claims lie at the heart of the grievance and arbitration machinery, are to a large degree inevitably intertwined with union interests and many times precipitate grave questions concerning the interpretation and enforceability of the collective bargaining contract on which they are based."

Equally vulnerable is the lower court's ruling that this suit is under Section 301(b) by the union "in behalf of the employees whom it represents," and not subject to Section 301(a) "for the simple reason that no one contends that the defendant owes any wages to the union." This is certainly novel distortion of this Court's rejection in *Evening News* of the *Westinghouse* ruling which had read wage suits out of Section 301(a). Faced with *Evening News*, the court below cannot avoid recognition of Section 301 jurisdiction, but now purports to find it only in a procedural subsection which this Court has never viewed as a separate grant of substantive jurisdiction to the federal courts.

Finally, by its "individual contract" rationale the court below *creates the very problem under Article III* of the Constitution which *Westinghouse* had sought to avoid. The court below concludes that the Indiana statute of limitations applies because this vacation pay suit presents only "a question of state law" for which Congress has provided a naked federal forum in § 301(b). But if Congress has thus created federal jurisdiction solely to resolve a question of state law, the court below has validated the very infirmity

which prompted this Court in *Westinghouse* to *reject* federal jurisdiction, and which it definitively avoided after *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, by holding that Section 301 invokes "federal substantive law."

In sum, the "state law" rationale of the court below is wholly erroneous; whatever else may be said for adopting the differing state limitations periods in Section 301 litigation, the lower court's predicate for that result will not suffice. And on a *de novo* assessment by this Court of the issue at hand, it is clear that the only result consistent with this Court's authorities is the adoption of uniform national limitations norms governing suits under Section 301.

I

THIS COURT SHOULD BAR APPLICATION OF DIFFERING STATE STANDARDS, AND INSTEAD PRESCRIBE APPROPRIATE AND UNIFORM FEDERAL LIMITATIONS FOR SECTION 301 ACTIONS.

This case presents the familiar problem of timeliness in the absence of Congressional specification. When Congress has set no limitations period for the assertion of a federal statutory right, this Court has sometimes looked to analogous state limitations to provide a federal standard; but this Court has *declined* to adopt the state limitations standard where to do so would interfere with federal supremacy or with a necessary uniformity in the vindication of uniquely national rights. The central question in the present case is whether in the enforcement of rights under Section 301 of the Labor-Management Relations Act, courts may apply differing local limitations periods without frustrating supremacy and uniformity goals underlying this federal statute.

1. In resorting to diverse state limitations, the lower court disregards this Court's decisions requiring uniform federal law under Section 301. In *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, this Court definitely ruled that courts are to fashion a body of substantive federal law in implementation of the statute. Subsequently, in *Charles Dowd Box Co.* v. *Courtney*, 368 U.S. 502, the Court extended the substantive law of Section 301 to state litigation. And in *Local 174, Teamsters Union* v. *Lucas Flour Co.*, 369 U.S. 95, 102, it ruled that in § 301 cases *"incompatible doctrines of local law must give way to principles of federal labor law."* In the latter decision, which rejects the survival of "individualized local rules" in litigation of collective bargaining agreement rights, this Court emphasized (at p. 103) the underlying uniformity goal, in terms applicable to the present question:

> "Comprehensiveness is inherent in the process by which the law is to be formulated under the mandate of *Lincoln Mills*, requiring issues raised in suits of a kind covered by § 301 to be decided according to the precepts of federal labor policy. More important, the subject matter of § 301(a) 'is peculiarly one that calls for uniform law.' . . . The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. . . ."

This Court having thus required under Section 301 what it has characterized as "a uniform body of federal substantive law" (*Smith* v. *Evening News Ass'n*, 371 U.S. 195, 200), it becomes clear that the applicable statute of limitations must also be a matter of uniform law, without state-by-state differentiation. This Court has long ago ruled that

statutes of limitations *so far affect substantive rights as to require that the limitations rule of the jurisdiction creating the cause of action apply irrespective of the forum involved.* Thus, when federal courts enforce state rights, state limitations apply (*Guaranty Trust Co.* v. *York,* 326 U.S. 99), and when state courts enforce federal rights, then federal limitations apply (*Burnett* v. *New York Central R. R.,* 380 U.S. 424; *McAllister v. Magnolia Petroleum Co.,* 357 U.S. 221; cf. *Garrett* v. *Moore-McCormack Co.,* 317 U.S. 239). It is thus clear that the choice of the appropriate limitation for suit under Section 301 is itself a question of federal law which invokes no considerations of deference to state jurisdiction.

It follows that the requirement of uniformity emphasized in *Lucas Flour* and *Evening News* precludes the adoption of differing state limitations periods for Section 301 litigation. Cf. *Republic Steel Corp.* v. *Maddox,* 379 U.S. 650. True, when Congress has provided no limitation this Court has frequently applied analogous state limitations to federal actions. See e.g. *Cope* v. *Anderson,* 331 U.S. 461; *Rawlings* v. *Ray,* 312 U.S. 96. But such "absorption of state statutes of limitations" is merely a matter of policy and convenience. *Holmberg* v. *Armbrecht,* 327 U.S. 392, 395. Accordingly, this Court has *declined* to adopt the local limitation when to do so would impair federal supremacy (*id*) or the necessary uniformity in implementation of such inherently national rights as arise in maritime law or interstate commerce (*Burnett* v. *New York Central R. R.,* 380 U.S. 424; *McAllister* v. *Magnolia Petroleum Co.,* 357 U.S. 221).[2]

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[2] The uniformity consideration which precludes adoption of varying state limitations to fill the federal void, is highlighted in the concurring opinion of Mr. Justice Brennan in *McAllister, supra,* in terms applicable in the present setting (357 U. S. at 228-230): ". . . I do not believe that the absence of specific directions from Congress leads necessarily to the result that state statutes of limitations should apply in cases

Certainly, if uniformity precludes application of differing state limitations under FELA, as this Court recently held in *Burnett*, the same result must obtain under Section 301. Subjecting Section 301 litigation to the diversity of state limitations would create the disharmony and promote resort to the forum shopping which this Court has sought in *Burnett* and *McAllister* to avoid under analogous enactments.[3]

The diversity here would be particularly aggravated, since limitations periods for contract actions provided in the several states vary from *as little as 60 days to as long as 20 years*. See "State Statutes of Limitations Governing Contract Actions," Appendix B to the Petition for Certiorari herein. And this is an area of litigation where the frequency of overlapping jurisdictions renders the possibility of forum shopping quite real. Today, collective bargaining agreements in major industries regularly transcend state borders, so that a company or union will often have a number of available jurisdictions for litigating rights under a single collective bargaining agreement.

Not only would the adoption of diverse state limitations thus promote disharmony and forum shopping, but extraordinary difficulties would then arise with respect to anti-

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of this sort . . . . the three-year limitation on the Jones Act remedy, 45 U.S.C. §56, is the ready and logical source to draw upon for determining the period within which this federal right may be enforced. This period should be applied in an action for unseaworthiness brought in a state court, just as it would be applied by the state courts in actions brought under the Jones Act, *Engel* v. *Davenport, supra.* Such a result would be in harmony with the practice in federal admiralty courts of applying state statutes of limitations in enforcing state-created rights. *Western Fuel Co.* v. *Garcia*, 257 U.S. 233. The alternative of subjecting the parties' rights to the variant state statutes of limitations and the consequent uncertainty of legal obligation would inject an unnecessarily sporting element into the affairs of men. Cf. *Guaranty Trust Co.* v. *York*, 326 U. S. 99. The mischief to be avoided is the possibility of shopping for the forum with the most favorable period of limitations."

[3] Cf. this Court's rejection in *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 109, of intra-state forum shopping.

quated state labor law theories which would tend to creep back into Section 301 through the statute of limitations loophole. For instance, after making limitations a matter of state law, the court below determined that the Indiana limitations statute on oral rather than written contracts applies, because Indiana would treat the suit as a common-law action for wages upon an oral agreement for hire rather than as collective bargaining agreement litigation. Yet that theory, whether or not consistent with Indiana law, certainly violates this Court's clear pronouncement in *Evening News*. See *supra*, p. 11. Thus if the court below is *correct* in applying local law philosophy of labor relations for purposes of choosing the applicable state limitations period, there is then created a dual and conflicting body of labor law under Section 301. On the other hand, if, as we believe (see *infra*, p. 23), the court below was *mistaken* in adopting antiquated Indiana labor law theory in its choice of a limitation period, then the adoption of local limitations under § 301 creates the burden that courts must discount the local law to the extent that its choice or application conflicts with federal labor law principles. In either event, only confusion and conflict can result if Section 301 is subjected to the variant state limitations periods.

It is clear, we submit, that this Court should fashion uniform federal limitations applicable to Section 301 actions. Recourse to varying state limitations when Congress has prescribed no limitation for a federal cause of action is at best a matter of convenience. In such cases as *Holmberg* and *McAllister* this Court found such resort to state law to fill the federal void to be inconvenient and erroneous. Only this year the Court declined in *Burnett* to apply the differing state norms on tolling of limitations to fill the void in the FELA limitations provision, because of

the same uniformity objective which it has so strongly emphasized in its decisions construing Section 301. See *supra,* pp. 13 to 14. We cannot believe that this Court would adopt differing state limitations under Section 301 and thus sanction the diversity and uncertainty which it so recently avoided in *Burnett* by fashioning its own FELA limitations-tolling norm.

2. Moreover, there are recognized principles available for fashioning uniform federal Section 301 limitations. These may be established in the same manner as other substantive law which this Court in *Lincoln Mills* relegated to judicial elaboration based on underlying federal policy, and much as equity courts have devised timeliness standards under the malleable doctrine of laches. For this purpose, it is appropriate to consider separately the major categories of Section 301 litigation: damage suits for breach of contract, injunctive actions, arbitration cases, and unfair representation litigation of the type represented by *Humphrey* v. *Moore,* 375 U.S. 335.[4] While not now necessary of definition, the Court may want to be assured that workable standards are in fact available for the application of uniform federal limitations.

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[4] Our view that Section 301 suits should for purposes of the appropriate limitation be treated differently depending upon the basic nature of the action, finds analogical support in this Court's decisions in *Beacon Theatres, Inc.* v. *Westover,* 359 U.S. 500 and *Simler* v. *Conner,* 372 U.S. 221. There the Court declined to prescribe a single rule under the Federal Declaratory Judgment Act as to the necessity of a jury trial, and instead made the "basic character" of the suit determinative on that subject. The differentiation between essentially common law and essentially equitable actions which this Court has made controlling in Declaratory Judgment Act cases on the right to a jury, is the same differentiation which we suggest this Court should make controlling here on the issue of limitations. Section 301 suits sounding in equity should be covered by the principle of laches, while those more in the nature of ordinary contract damage actions should be governed by uniform time limitations.

i. Perhaps the easiest limitations norm is the one pertinent to such a case as the present one—a suit for damages caused by breach of a collective agreement. Such suits most resemble the common law breach of contract action, and a distillation of the prevailing state limitations governing contract actions provides a guide for the creation of a Section 301 norm. Examination of Appendix B to the Petition for Certiorari—"State Statute of Limitations Governing Contract Actions"—shows six years as the median period on contract actions in the states (excluding suits on sealed contracts and on oral contracts, which would be highly unusual in the area of collective bargaining agreements). That is also the standard which Congress has approved for contract suits in the Court of Claims (28 U.S.C. § 2401 (a)) against the United States. As we indicate hereafter (*infra*, p. 20), this suit was brought well within the six year federal norm here suggested if the Court applies the same savings rule it applied in *Burnett* to toll limitations during the earlier pendency of state litigation which was dismissed on procedural grounds.

ii. Nor should there be any difficulty about Section 301 suits seeking injunctive relief rather than damages for breach. This Court's ruling and observations in *Holmberg* make clear that in federal equity actions, when Congress has provided no limitations period, this Court will prescribe the equity doctrine of laches to govern the question of timeliness.

iii. The same result, we submit, should obtain in Section 301 cases involving arbitration of collective bargaining agreements. In suits to compel arbitration (such as *Lincoln Mills*) or suits to enforce arbitral awards (such as *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593), the equity power of the court is being invoked.

Once again, therefore, the rule of laches appears appropriate for application to such Section 301 actions. See *U.E.* v. *General Elec. Co.*, 43 L.R.R.M. 2822 (U.S.D.C. Mass., 1959).

iv. Another significant category of suits arises from such cases as *Humphrey* v. *Moore*, 375 U.S. 335, wherein individual employees sue employers and unions in Section 301 actions and assert that the union has unfairly represented their interests with respect to the making or enforcement of a collective bargaining agreement. While the *remedy* sought in such cases addresses itself to the union-employer contract, the *predicate* of these actions is actually the claim of unfair representation, under the right first enunciated by this Court in *Steele* v. *Louisville & Nashville R. R.*, 323 U.S. 192. The decisions have treated the claim for specific relief in such cases as equitable in nature, and have accordingly declined to apply any set time limitation thereto. See *Brotherhood of Locomotive Firemen and Enginemen* v. *Mitchell*, 190 F. 2d 308 (C.A. 5, 1951); *Central of Georgia Ry.* v. *Jones*, 229 F. 2d 648 (C.A. 5, 1956), *cert. den.*, 352 U.S. 848. On the other hand, the money damage claims in unfair representation cases have been subjected to brief limitations by analogy to state limitations governing suits for injury to the person or rights of another. *Id.* The normal state limitations period governing suits for injury to the person approximates two to three years.[5] Among these is the Congressional enactment for the District of Columbia, D.C. Code § 12-201. It may also be noted with respect to Section 301 unfair representation suits, that most Federal tort limitations are within the two-to-three year range. See 45 U.S.C. § 56 (FELA, 3 years); 46 U.S.C. § 688 (Jones Act, 3 years);

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[5] See Segal, *Digest of Statutes of Limitations in Personal Injury, Death and Allied Actions*, 8 *The Practical Lawyer* No. 4, p. 71 (1962).

28 U.S.C. § 2401 (b) (FTCA, 2 years). These relatively short limitations for Federal tort suits are consistent with the historical tradition of brief limitations in tort actions. From these guidelines we are confident that courts can fashion appropriate limitations norms governing damage claims in Section 301 actions alleging union unfair representation in the making or enforcement of the collective bargaining agreement.[6]

It is not presently necessary to determine all the guidelines which may be appropriate in the elaboration of uniform federal limitations applicable to Section 301 actions. For now it is enough that uniform timeliness standards are capable of judicial elaboration, and that they are preferable to application of differing local limitations in Section 301 litigation. We ask this Court so to hold, and we demonstrate in the next section of our Argument that this case was timely filed and should be remanded to the District Court for trial.

II

THIS SUIT WAS TIMELY FILED UNDER THE SUGGESTED FEDERAL LIMITATIONS STANDARD.

Should this Court adopt, as we urge above, a uniformity principle and reject state-by-state variation of the limitations periods for Section 301 suits, it seems clear from the

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[6] A related issue not now before this Court concerns the limitations periods which may apply to suits under Section 303 of the Act. In the absence of a Congressionally prescribed limitation, the Ninth Circuit recently decided to apply the California limitation in such a case. *International Union of Operating Engineers* v. *Fischbach and Moore, Inc.*, 350 F. 2d 936 (C.A. 9, 1965). Since suits under Section 303 are based on the same secondary boycott prohibitions which constitute unfair labor practices under Section 8(b)(4) of the Act, resort to the six-month limitation for charging a violation of that provision before the National Labor Relations Board would appear a more appropriate standard—one which would be uniform throughout the nation and carry out the manifest Congressional purpose.

tolling rule in *Burnett* v. *New York Central R. R.*, 380 U.S. 424, that the action presently before the Court was timely filed. In *Burnett* this Court recently found the application of varying state savings statutes to FELA actions disruptive of the necessary uniformity Congress sought to promote by the enactment of that statute. Accordingly, it held that where part of the normal limitations period was consumed by litigation dismissed on procedural grounds—in that case because of improper venue—the limitations period was tolled from the commencement of the litigation to the date when its dismissal became final. In terms as clear and indeed even more clear than those to which it gave emphasis in its recent *Burnett* decision with respect to the FELA, this Court has emphasized the uniformity objective behind Section 301. See *supra*, p. 13. Accordingly, we submit that the same tolling principle this Court adopted in *Burnett* necessarily applies to limitations standards this Court approves for Section 301 actions. It follows that this suit was timely filed, in view of the five-year tolling occasioned by the previous state litigation dismissed on procedural grounds. See Appendix, *infra*, pp. 1 to 32.[7]

Thus, under the *Burnett* rule, if a tolling commenced by virtue of the Indiana litigation, the running of the limitations period was suspended eight months after the accrual of this cause of action, by the filing of the state suit in *Johnson* v. *Hoosier Cardinal Corp.* on February 21, 1958. More-

[7] Respondent has suggested that the tolling contention made herein comes too late, not having been raised below. But there is no jurisdictional bar to this Court's consideration of additional grounds for the same contention of timeliness which petitioner made below. Moreover, this Court's decision earlier this year in *Burnett* changed existing law and created a new federal rule with respect to the tolling of limitations on federal causes of action. Petitioner was not required to anticipate this Court's *Burnett* ruling, and is entitled now to urge the *Burnett* rule as dispositive of the narrow question presented. See *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U.S. 538.

over, the federal suit presently before this Court was filed eleven months after the finality of the judgment of the Appellate Court of Indiana affirming the dismissal, on procedural grounds, of that action.[8] Thus some five years was consumed by the state litigation, and the limitations period actually ran for only nineteen months. Accordingly, *this suit was timely filed under any limitations period not less than two years in duration,* since by application of the *Burnett* rule limitations ran for only eight months before tolling commenced and eleven months after it ended. Such a tolling is particularly appropriate in the present case where it was this Court's now-overruled *Westinghouse* doctrine which occasioned the protracted and unsuccessful effort to invoke the Indiana jurisdiction.

III

THIS SUIT WAS TIMELY FILED EVEN IF THE INDIANA LIMITATONS SHOULD APPLY.

We have emphasized the necessity for federal limitations norms under Section 301, and are confident that this Court will agree with our presentation on that score. But if the Court should adopt a contrary view, the suit presently before the Court was nevertheless timely filed even under the Indiana limitations statutes.

On this score, the court below agreed that the Indiana limitation applicable to suits on "contracts in writing" is twenty years—Burns' Ind. Stat. Ann. §2-602; but the court rejects that period in favor of the Indiana six year limitation applicable to "contracts not in writing." To

[8] The opinion and judgment of the Appellate Court of Indiana affirming the dismissal of the state suit were issued on April 18, 1963, and became final twenty days thereafter under Rule 2-22 of the Indiana Supreme Court. This suit was filed on April 8, 1964.

reach that result the court declares that this action is actually "based upon the contracts of employment between the individual employees and defendant," and that there is no evidence that these employment contracts were ever reduced to writing (R. 28). Stating that it is "under these employment contracts that the present action was brought," the court concludes that the six year statute governing suits on oral contracts applies.[9]

But even if local limitations apply, the choice of the applicable limitation is nevertheless a federal question both under this Court's general limitations authorities and its Section 301 decisions. Thus, this Court emphasized in its leading analysis in *Holmberg* v. *Armbrecht*, 327 U.S. 392, 395, that in appropriate circumstances "it is federal policy to adopt the local law of limitation," but emphasized that "the implied absorption of State statutes of limitations within the interstices of the federal enactments is a phase of fashioning remedial details where Congress has not spoken but left matters for judicial determination . . . ." It cannot be that the choice of the state statute to be federally absorbed can rest upon principles contrary to the substantive law of the federal statute upon which the local limitations is judicially engrafted. That is also the teaching of this Court's Section 301 authorities. As this Court noted in *Charles Dowd Box Co.* v. *Courtney*, 368 U.S. 502, 506-7, *Lincoln Mills* recognized that " 'state law . . . may be resorted to in order to find the rule that will best effectuate the federal policy,' but emphasized that '[a]ny state law

[9] Petitioner did not urge below as an alternative argument under the Indiana limitations the timeliness of the suit under the Indiana savings statute. That statute—Burns' Ind. Stat. Ann. § 2-608—tolls the running of limitations for a period of five years folowing dismissal of a timely action other than on its merits. Trial counsel for petitioner deemed that Indiana provision inapplicable in this case, and we do not suggest that it could properly be invoked here, particularly since *Burnett* rejected the applicability of state savings statutes to federal causes of action.

applied . . . will be absorbed as federal law' . . . ." And in *Local 174, Teamsters Union* v. *Lucas Flour Co.*, 369 U.S. 95, this Court stated in terms dispositive of the present question that under Section 301 "incompatible doctrines of local law must give way to principles of federal labor law."

It follows that the "individual contract of employment" rationale of the court below is an erroneous predicate for application of the Indiana oral contract limitation. As we have earlier indicated (*supra*, pp. 10-11), the "individual contract of employment" theory, intimated by this Court's opinion in *Westinghouse*, was rejected by this Court in *Smith* v. *Evening News Ass'n*, 371 U.S. 195, 198-200. Moreover, unlike the general claim for wages involved in *Westinghouse*, this suit is predicated upon the express vacation pay provisions of the written collective bargaining agreement (R. 5). Nor is there any mention in the Complaint (R. 3) of any individual contracts of employment as a predicate of the suit.

Thus, either as an inference of law or an assertion of fact the lower court's "individual contract of employment" rationalization is erroneous. If taken as an inference of law, it is repelled by this Court's decision in *Evening News* rejecting the *Westinghouse* rationale. If deemed to be an assertion of fact, it is repelled by the vacation pay provisions of the written collective bargaining agreement (R. 5). Accordingly, even if the local statutes were to be applied in determining the limitation period applicable to this case, Indiana's twenty-year limitation would govern since this suit rests exclusively on a written collective bargaining agreement.

Conclusion

For the foregoing reasons it is submitted that the judgment below should be reversed.

Respectfully submitted,

JOSEPH L. RAUH, JR.,
JOHN SILARD,
STEPHEN I. SCHLOSSBERG,
1625 K Street N.W.
Washington 6, D. C.,
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Of Counsel:

Miles and Cummings
605 Union Title Building,
Indianapolis, Indiana

APPENDIX

APPENDIX

Filed Feb. 21, 1958, s/ Bert Reed, Clerk.

IN THE SUPERIOR COURT OF VANDERBURGH COUNTY

Cause No. C-7824

STATE OF INDIANA,
County of Vanderburgh, ss:

KENNETH H. JOHNSON, RAYMOND F. FALLEN, JUANITA M. MILLER, DELORES ESTHER SCHMIDT, BERTHA COLBERN, NORMAN HOOE, WALTER DUNN, WILLIE H. SCHNEIDER, AS INDIVIDUALS AND AS REPRESENTATIVES OF A CLASS, *Plaintiffs*,

vs.

HOOSIER CARDINAL CORPORATION, *Defendant*

COMPLAINT

Come now the plaintiffs, for themselves and others similarly situated, the members of a class who are very numerous, being more than one hundred in number, and for cause of action state:

1. That each of the named plaintiffs prior to the beginning of this action has been an employee of the defendant corporation, Hoosier Cardinal Corporation;

2. That each and all the named plaintiffs are members of a class of former employees of defendant corporation and that the members of said class are united in interests; that the members of said class are too numerous, being more than one hundred in number, to be before this Court; that the named plantiffs fairly represent the interests and rights of the class and this Court can ajudicate the rights of all the members of this class fairly and justly in this action and through these representatives;

3. That the defendant is a corporation organized under the laws of the State of Indiana;

4. That on or about the 1st day of September, 1955, the plaintiffs by their collective bargaining representative, United Automobile, Aircraft and Agricultural Implement Workers and Local 145 thereof and the defendant corporation by its officers, entered into an agreement, a copy of which is filed herewith and made a part of this complaint and is marked "Plaintiffs' Exhibit 1;"

5. That as part of the compensation of said employees, Article VIII of said agreement guarantees vacation wages to all employees who have either worked at least 1000 hours during the preceeding twelve months or who have certain seniority rights as described in Article VIII; that said vacation pay is to be based on the average wages of each employee during the preceeding twelve months;

6. That prior to the 1st of June, 1957 and since the 1st of January, 1957 the named plaintiffs and each member of the class of said former employees which said plaintiffs represent have earned wages according to said Article VIII in varying amounts all as shown in Plaintiffs' Exhibit 2, which is now filed and made a part of this complaint;

7. That on or about the 1st day of June, 1957, defendant discontinued the employment of the named plaintiffs and the employment of all the members of the class which said employees represented, but defendant has consistently refused to pay over to said plaintiffs or to any members of the class represented herein any of the accumulated and accrued wages which are now due and owing;

8. That the pay records of plaintiffs and each member of the class represented herein are in the possession and control of the defendant; that plaintiffs have no access to said records;

9. That plaintiffs and the members of the class herein are without accurate records to determine the exact amount or amounts of wages which they have earned from said defendant; that according to their knowledge and belief, said wages now owing to all the plaintiffs and the members of the class are in the amount of Forty Thousand Dollars, ($40,000.00), all as shown by Plaintiffs' Exhibit 2;

10. That pursuant to the Acts of the General Assembly of the State of Indiana for the year 1911, Chapter 68, Sections 1 and 4 thereof, in accordance with the Acts of the General Assembly for the year 1933, Chapter 47, Section 2, there is due the plaintiffs and the members of the class they represent an amount equal to double the unpaid wages, which amount is Eighty Thousand Dollars, ($80,000.00);

11. That defendant corporation is in imminent danger of insolvency and has in fact discontinued many of its operations in this state; and that defendant has transferred many of its assets to the Mimosa Corporation in South Carolina and beyond the jurisdiction of the Indiana courts; that defendant's assets remaining in the jurisdiction of the Indiana courts are now advertised for sale; that all security for the protection of these plaintiffs' liens for wages is in danger of dissipation and distribution; that unless said remaining assets are impounded or otherwise protected from dissipation and distribution, the plaintiffs herein and all the members of the class represented by them will be prevented from achieving any practical satisfaction of their claims;

12. That it will be to the best interests of plaintiffs and the members of the class which they represent and all creditors of the defendant corporation to have a receiver appointed for said defendant corporation to conduct and carry on the business of said defendant corporation and to preserve and distribute the assets thereof;

13. That the defendant corporation is now threatened with a multiplicity of law suits and plaintiffs and the members of the class which they represent have no adequate remedy at law.

WHEREFORE, the plaintiffs ask for judgment against the defendant corporation in the amount of Forty Thousand Dollars, ($40,000.00) with liquidated damages in the amount of Eighty Thousand Dollars ($80,000.00), together with a reasonable fee for plaintiffs' attorney, that the plaintiff recover costs of the defendant, and further asks that this Court appoint a receiver for the property and assets of the said defendant corporation with the usual powers and authority conferred upon a receiver in such cases and that

this Court order that this matter be set down for hearing for the appointment of a receiver and for all other relief right and proper.

/s/ LYNNVILLE G. MILES,
LYNNVILLE G. MILES AND DANIEL F. CUMMINGS,
Attorneys for Plaintiffs.

PLAINTIFFS' EXHIBIT 1

(1955 collective bargaining agreement between United Automobile, Aircraft and Agricultural Implement Workers and its Local 145 and Hoosier Cardinal Corporation.)

Plaintiffs' Exhibit 2

Name of Employee	Number of Hours Worked From Jan. 1 to June 1, 1957	Average Rate of Pay
Kenneth H. Johnson	1200 plus	$2.17
Ollie Nunn	838.88	1.68
Dale Sanders	1200	1.78
Lila Gish	600	1.78
Elmer Emmerson	640	2.16
Gusta Genter	1200	1.68
Thelma Mayse	600	1.76
Joseph Stippler	900	1.69
Beatrice Browning	640	1.77
Mary Decker	1100	1.96
Ivan Newcomb	1000 or more	1.96
William Gish	1000 or more	1.80
Marie Nieten	700	1.78
Norma Erwin	560	1.96
Ada Putko	640	1.78
Doris Emmerson		1.78
Lyman Hendershott	1300	1.80
Beulah Faye Hendershott	500 or more	1.67
Robert Powers	600	1.78
Raymond F. Fallen	1100	2.66 and 1.67
George W. Dunn	1150	1.98
Bertha Cauebun	1300	1.96
Kenneth M. Wilson	1300	1.89
Leroy Gardner	over 1000	2.11
Juanita M. Miller	1020	1.96
Frank L. Maidlow	1100	1.67
Katherine P. Yaser	1000	1.76
Mary L. Dexter	between 500 and 600	1.76
Carl L. Mall, Jr.	1100 plus	2.33
Lillian M. Barth	620	1.66
Warren W. Dimmett	1048	1.68
Elizabeth Runau	700	1.78
Edwin J. Firth	1225	1.96
James H. Williams	1220	1.96
Thomas Lee Culley	over 1000	2.31
Delores Esther Schmidt	1100	2.00
Marie Marlin	1150	2.00
Adolph T. Kuhn	1188	2.08
Cody F. Bohleber	1000 plus	1.78
T. Dockery	1080	1.96
Russell Schlegel	1100	1.77
Sylvester J. Runau	over 1000	2.30
Edward L. Runau	1175	2.30
John S. Phillips	1005	2.04
Charles E. Morlock	1000 plus	2.33
Irene Cox	800	1.96
Doris R. Ungetheim	840	1.78
Edwin Cianor	1100	1.77
William Dirhlmann	over 1000	1.99
William James Heyna	under 1000 (over half pay period)	1.98
Roy McCrarey	over 1000	1.79
Alvin Opperman	1100 plus	1.97
Willie H. Schneider	over 1000	1.64

Name of Employee	Number of Hours Worked From Jan. 1 to June 1, 1957	Average Rate of Pay
Maurice E. Williams	1200	$2.12
Frederick E. Barton	1184	1.78
Elmer H. Mann	1100 plus	1.97
George Russell	1160 plus overtime	2.07
E. W. Tenbarge	1000	1.96
Thomas W. Barnard	1150	2.24
Charles E. Bolton	1100 plus	2.07
Walter T. Schneider	1050	1.88
Charles Cutteridge	1200	1.86
Vestus Mayse	over 1000	1.86
Louis R. Stuom	1200	1.86
Jesse L. Shuck	over 1000	1.64
Clarence Roy LaMar	1200	2.19
Fannie L. Webster	1140	1.96
Wilbur Howery	over 1000	1.96
Gene Burdge	1250	2.50
Howard F. Moffett	1211	1.99
Rupert H. Riley	1253	2.16
Robert Harden	1200	1.16
Clyde W. Grove	1157	2.14
Avis L. Bolton	1184	2.06
Ruth P. Randolph	600	1.96
Malcolm Ernest Summers	1100 plus	2.27
Dalton M. Shaw	over 1000	1.97
Anna R. Grimm	620	1.96
Reginal Butze	1010	2.08
Warren Reynolds	over 1200	1.76
Margaret Golden Cavett	1200	2.15
Valada Gibson	1200	2.15
Minnie B. Madden	700	1.78
William S. Winterath	1100	2.00
Willis Brack	over 1150	1.76
Elizabeth Sauer	More than 50% Terminated Apr. 18, 1957	1.66
Norman J. Hove	over 1000	2.56
M. Cecilia Kanges	over 50% (Pay period)	1.96
Charles Dickens	1040	1.86
Louise Tomlinson	950	1.96
Hazel L. Ritter	1120	1.76
Ethel M. Hudson	approx. 938	1.76
Welby W. Cobb	over 1000	2.71
Anna P. Stewart	600	1.66
Mary K. Koch	600	1.66
Ruby Pifer	about 1350	1.96
Wilhelmina Batteiger	1120	
Louise Steishauser		1.76
Ida J. Kuntz	1225	1.76
Irma S. Koelling		1.96
Francis Grant	1200	1.77
Jennie Altkisson	appx. 800	1.96
J. Ash K. Aight	1000 plus	2.30
Mildred Crane	about 700	1.96
Fred M. Hoffmann	over 1000	2.04
Jack Threale	1100	2.00
Philip E. Zerkelbach	1160	1.97
Clarence E. Rieber	appx. 1300	2.37
Harold W. Dawson	1150	
Elgon Turner	640	2.07

Name of Employee	Number of Hours Worked From Jan. 1 to June 1, 1957	Average Rate of Pay
Clarence A. Moll	1120	$2.04
Sturgis Collins	1179	1.31
Elnara L. Moll	1000	1.96 then 1.76
Glenn		2.08
Frances Schneider	1300	1.97
Beulah A. Brink	over 1000	1.97
Irma Whitledge	about 700	1.96

GIBSON CIRCUIT COURT

A. Dale Eby, Judge
Princeton, Indiana

January 20, 1959

Mr. Sydney L. Berger
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Evansville, Indiana

Attention: Willard Shrode

Re: No. C-7824, Vanderburgh Superior Court. Johnson, et al v. Hoosier Cardinal

Gentlemen:

I have been spending quite a bit of time on questions involved in this case—more time than I should, taking into consideration the other business which I have in this court. However, there is an interesting question involved and one affecting the rights of many persons. Therefore, I feel that the time I have spent in this matter is fully justified. Especially is this true since I ruled on this matter at the trial and perhaps on the motion to strike out when first presented without going into the matter as thoroughly as I should have.

The main question in this case before me now, as I see it, is Specification 2 in the motion of the defendant to strike out parts of plaintiff's complaint, which is rhetorical

paragraph 6 of the complaint. This paragraph alleges in substance that the plaintiff and each member of the class which the plaintiff represents has earned wages as set forth in Exhibit 2. In other words, it is a motion to strike from the complaint that part which alleges that it is a class action.

In going into the law on this question, it seems to me to be universally agreed that a party who sues in a representative capacity must have an interest in the controversy common with those for whom he sues and there must be that unity of interest between him and all the other parties that would entitle them to maintain an action if the suit was brought by them jointly. The action is in effect brought by all the parties, and the party named as plaintiff stands simply as a representative for himself and all others. If the interest is separate, the action must be brought separately by each person interested, for those having a separate interest cannot join in this action (See Certia vs. University of Norte Dame, 82 App. 542, pages 544 and 545).

As stated in Grover vs. Marott, 192 Ind. 552, page 558, it says: "The rule of the joinder of plaintiffs in this jurisdiction, briefly stated, requires that all who unite as plaintiffs must have a common interest in the subject matter of the action *and each must be interested in the relief of the other* but the equality of the interest or that such interest may be legally several is not essential". This case is cited with approval in Kimes v. City of Gary, 224 Ind. 300.

Furthermore, it has been held that in order to prosecute a class action, there must be a joint cause of action in all the members of the class.

Certainly in the case before us, the right of the plaintiffs is not joint but several. Each plaintiff seeks to recover a certain amount of money to be determined, but no one can say that each plaintiff is interested in the relief of any other plaintiff. Each seeks to recover for himself or herself and it cannot make any difference to him or her what some other plaintiff recovers.

This court has read and given a great deal of time and thought to all the cases cited in the briefs, especially the case of *McKenna* vs. *Standard Oil Company*, 140 NE (2) 512 (236 Ind. 370), which cites with approval the case of *Mosetta* vs. *National Bronze and Aluminum Foundry Company*, 112

NE (2) 15, an Ohio case, and I am unable to see how this court can get around the reasoning held in that case. I believe that it states the law in Indiana, that this is a several action and not a joint action, and that each of the plaintiffs must maintain his action in his own name.

I can readily see where a representative suit could be brought where all the plaintiffs seek to recover rights under a contract or enjoin something which is common to all, etc., but here each plaintiff, as I said before, seeks to recover a sum of money for himself or herself individually and the relief could not be common to all.

Therefore, I am making the following ruling in this case:

"Come again the parties hereto by counsel, and the Court having had under consideration the defendant's motion to strike out parts of plaintiff's complaint and now being sufficiently advised in the premises, sustains said motion as to Specification 2, which is rhetorical paragraph 6 of the complaint, and overrules said motion as to Specifications 1, 3 and 4.

And the Court having had under consideration the motion of the defendant to require the plaintiffs to make the complaint more specific, definite and certain and now being sufficiently advised in the premises, overrules said motion as to Specifications 1 and 2 and sustains said motion as to Specification 3, with exception to the parties".

I believe that the amendment was made as to vacation pay instead of wages and, if not, it should be done, although wages would include vacation pay.

It may appear to be a hardship that all employees have to file separate actions, but I believe this is a matter for the Legislature to determine and not one to be determined by the courts under our present statutes as I interpret them.

If the weather permits, I will be in Superior Court in Evansville on Wednesday, January 21, 1959 (which is the day you will receive this letter), at 11:30 A. M. to make this ruling.

Sincerely yours,

/s/ A. Dale Eby,
A. Dale Eby,
Special Judge.

ADE:lhf

BE IT REMEMBERED that on the 21st of January, 1959, the same being the 36th Judicial Day of the December Term, 1958, of the Superior Court of Vanderburgh County, an entry was made in the order book of said court, which entry is in words and figures as follows, to-wit:

C-7824

KENNETH H. JOHNSON, ET AL,

vs.

HOOSIER CARDINAL CORPORATION

Comes again the parties hereto by counsel, and the Court having had under consideration the defendant's motion to strike out parts of plaintiffs' complaint and now being sufficiently advised in the premises, sustains said motion as to Specification 2, which is rhetorical paragraph 6 of the complaint, and overrules said motion as to Specifications 1, 3 and 4. And the court having had under consideration the motion of the defendant to require the plaintiffs to make the complaint more specific, definite and certain and now being sufficiently advised in the premises, overrules said motion as to Specifications 1 and 2 and sustains said motion as to Specification 3, with exception to the parties.

s/ A. DALE EBY,
Hon. A. DALE EBY,
Special Judge.

Vanderburgh Superior Court Filed Aug. 7, 1959
s/ Bert Reed, Clerk

IN THE SUPERIOR COURT OF VANDERBURGH COUNTY

Cause No. C-7824

STATE OF INDIANA,
County of Vanderburgh, ss:

FRANK KAVANAUGH, *Plaintiff*,

vs.

HOOSIER CARDINAL CORPORATION, *a Corporation Defendant*

AMENDED COMPLAINT

Comes now Frank Kavanaugh, plaintiff herein, and alleges:

1. That on or about the 1st day of February, 1958, the plaintiff herein received certain wage claims by written, endorsed assignment from numerous endorsers and assignees; that a copy of said assignment is filed herewith, made a part of this complaint and marked Plaintiff's Exhibit "A".

2. That each of the endorsers-assignors appearing in the aforementioned Exhibit "A" prior to the aforesaid assignment was an employee of the defendant, Hoosier Cardinal Corporation.

3. That on or about the 1st day of September, 1955, the assignors by their collective bargaining representative, United Automobile, Aircraft & Agricultural Implement Workers of America and Local 145 thereof and the defendant corporation by its officers, entered into an agreement, a copy of which is filed herewith and made a part of this complaint, and marked Plaintiff's Exhibit "B".

4. That as part of the compensation of said employees referred to in Article VIII of said agreement, vacation

wages were guaranteed to all employees who have either worked at least One Thousand (1000) hours during the preceding Twelve (12) months or who have certain seniority rights as described in Article VIII; that said vacation pay is to be based on the average wages of each employee during the preceeding Twelve (12) Months.

5. That prior to the 1st of June, 1957, and since the 1st of January, 1957, the assignors herein have earned wages according to said Article VIII in varying amounts all as shown in Plaintiff's Exhibit "C" which is now filed and made a part of this complaint.

6. That on or about the 1st day of June, 1957, defendant discontinued the employment of these assignors but defendant has consistently refused to pay over to said assignors any of the accumulated and accrued wages which are now due and owing.

7. That the pay records of these assignors are in the possession and control of the defendant; neither plaintiff nor his assignors have access to said records.

8. That neither this plaintiff nor his assignors have accurate records to determine the exact amount or amounts of wages which said assignors have earned from said defendant; that according to the knowledge and belief of plaintiff and his assignors, said wages now owing are in the amount of Forty Thousand Dollars ($40,000.00), all as shown by Plaintiff's Exhibit "C".

9. That pursuant to the Acts of the General Assembly of the State of Indiana for the year 1911, Chapter 68, Sections 1 and 4 thereof, in accordance with the Acts of the General Assembly for the year 1933, Chapter 47, Section 2, there is due the plaintiff and his assignors as liquidated damages an amount equal to double the unpaid wages, which amount is Eighty Thousand Dollars ($80,000.00).

WHEREFORE, plaintiff prays judgment against the defendant corporation in the amount of Forty Thousand Dollars ($40,000.00) with liquidated damages in the amount of

Eighty Thousand Dollars ($80,000.00) together with a reasonable fee for plaintiff's attorney, costs of this action and all other relief right and proper in the premises.

Respectfully submitted,

s/ LYNNVILLE G. MILES,
LYNNVILLE G. MILES.

s/ DANIEL F. CUMMINGS,
DANIEL F. CUMMINGS,
Attorneys for Plaintiff.

Vanderburgh Superior Court, Filed Aug. 26, 1959, Bert Reed, Clerk

IN THE SUPERIOR COURT OF VANDERBURGH COUNTY, VANDERBURGH COUNTY, INDIANA, JUNE TERM, 1959

Cause No. C-7824

STATE OF INDIANA,
County Of Vanderburgh, ss:

FRANK KAVANAUGH, *Plaintiff*,

vs.

HOOSIER CARDINAL CORPORATION, A CORPORATION, *Defendant.*

DEFENDANT'S DEMURRER TO PLAINTIFF'S AMENDED COMPLAINT

The defendant, Hoosier Cardinal Corporation, demurs to the amended complaint of the plaintiff, Frank Kavanaugh, on the following grounds:

1. That the amendment complaint does not state facts sufficient to constitute a cause of action.
2. That the plaintiff has no legal capacity to sue.
3. There is a defect of parties plaintiff in this: That some one of the persons referred to in plaintiff's amended complaint as assignors, and who are named in Exhibit "A" attached to and made a part of plaintiff's amended complaint, is the necessary plaintiff and is not joined as such.
4. That several causes of action are improperly joined as follows: The amended complaint shows on its face that the alleged wage claims which were assigned to the plaintiff herein, if valid, would constitute separate independent causes of action of each assignor against the defendant herein, and said several causes of action cannot be joined in one cause of action.

KAHN, DEES, DONOVAN, KAHN & SHRODE,

By ————

Attorneys for Defendant.

MEMORANDUM

1. The amended complaint shows on its face that the alleged claims of certain of the individual employees of the defendant were assigned to the plaintiff herein without consideration and purely for the purpose of permitting him to bring an action thereon, and if successful, to distribute to each of the assignors the sum collected, less the expenses of collection. This shows that the plaintiff herein is not the real party in interest and, therefore, cannot maintain this action on any of the alleged claims of said employees.

2. The amended complaint shows on its face that the only persons entitled to the true fruits of the action and, hence, the real parties in interest, are the assignors of the alleged claims sought to be recovered by the plaintiff herein, and that the plaintiff herein simply has the bare legal title to such claims which is insufficient to constitute him a real party in interest and, therefore, he has no capacity to sue on said alleged claims.

KAHN, DEES, DONOVAN, KAHN & SHRODE,

By _____

Attorneys for Defendant.

An oral argument is respectfully requested.

KAHN, DEES, DONOVAN, KAHN & SHRODE,

By _____

Attorneys for Defendant.

Two copies of the above and foregoing Defendant's Demurrer to Plaintiff's Amended Complaint were handed to Sydney Berger, 7 Koenig Building, 114 N. W. Fourth Street, Evansville, Indiana, this 26th day of August, 1959.

KAHN, DEES, DONOVAN, KAHN & SHRODE,

By _____

Attorneys for Defendant.

BE IT REMEMBERED that on the 23rd day of September, 1959, the same being the 12th Judicial Day of the September Term, 1959, of the Superior Court of Vanderburgh County, an entry was made in the order book of said court, which entry is in words and figures as follow, to-wit:

C7824

KENNETH H. JOHNSON, ET AL,

vs.

HOOSIER CARDINAL CORPORATION

Comes the parties hereto by counsel and the court having had under consideration the defendant's Demurrer to plaintiff's Amended complaint and now being sufficiently advised in the premises, sustains said demurrer, to which ruling and action of the court the plaintiff at the time excepts. Plaintiff given till November 18, at 2 P.M. to plead over or judgment will be rendered.

s/ A. DALE EBY,
Hon. A. DALE EBY,
Special Judge.

Vanderburgh Superior Court, Filed December 9, 1959
s/ Bert Reed, Clerk

IN THE SUPERIOR COURT OF VANDERBURGH COUNTY

Cause No. C-7824

STATE OF INDIANA,
County of Vanderburgh, ss:

KENNETH H. JOHNSON, RAYMOND F. FALLEN, JUANITA M. MILLER, DELORES ESTHER SCHMIDT, BERTHA COLBERN, NORMAN HOOE, WALTER DUNN, WILLIE E. SCHNEIDER, AS INDIVIDUALS AND AS REPRESENTATIVES OF A CLASS, *Plaintiffs*,

vs.

HOOSIER CARDINAL CORPORATION, *Defendant*

AMENDED COMPLAINT

Come now the plaintiffs, for themselves and others similarly situated, the members of a class who are very numerous, being more than one hundred in number, and for cause of action state:

1. That the defendant is a corporation incorporated under the laws of the State of Indiana;

2. That each and all the named plaintiffs and each and all the members of the class which these named plaintiffs represent have been employees of the defendant corporation prior to the commencement of this action; that the question presented in this complaint is of common interest to all members of the aforesaid class; that the members of said class are numerous, being more than one hundred in number and it is impracticable to bring them all before the Court; that the named plaintiffs fairly represent the interests and rights of this class and this Court, can ajudicate the rights of all the members of this class fairly and justly in this action and through these representatives;

3. That on or about the 1st day of September, 1955, the plaintiffs by their collective bargaining representative,

United Automobile, Aircraft and Agricultural Implement Workers and Local 135 thereof and the defendant corporation by its officers, entered into an agreement, a copy of which is filed herewith and made a part of this complaint and is marked "Plaintiffs' Exhibit 1;"

4. That the claim of each of the plaintiffs and of each member of the plaintiffs' class arises from and out of the branch of the collective bargaining contract described as "Plaintiffs' Exhibit 1;"

5. That as part of the compensation of said employees, Article VIII of said agreement guarantees vacation wages to all employees who have either worked at least 1000 hours during the preceeding twelve months or who have certain seniority rights as described in Article VIII; that said vacation pay is to be based on the average wages of each employee during the preceeding twelve months;

6. That prior to the 1st of June, 1957, and since the 1st of January, 1957, the named plaintiffs and each member of the class of said former employees which said plaintiffs represent have earned wages according to said Article VIII in varying amounts all as shown in Plaintiffs' Exhibit 2, which is now filed and made a part of this complaint;

7. That on or about the 1st day of June, 1957, defendent discontinued the employment of the named plaintiffs and the employment of all the members of the class which said employees represented, but defendant has consistently refused to pay over to said plaintiffs or to any members of the class represented herein any of the accumulated and accrued wages which are now due and owing;

8. That the pay records of plaintiffs and each member of the class represented herein are in the possession and control of the defendant; that plaintiffs have no access to said records;

9. That plaintiffs and the members of the class herein are without accurate records to decertain the exact amount or amounts of wages which they have earned from said defendant; that according to their knowledge and belief, said wages now owing to all the plaintiffs and the members of the class are in the amount of Forty Thousand Dollars, ($40,000.00), all as shown by Plaintiffs' Exhibit 2;

10. That pursuant to the Acts of the General Assembly of the State of Indiana for the year 1911, Chapter 68, Sections 1 and 4 thereof, in accordance with the Acts of the General Assembly for the 1933, Chapter 47, Section 2, there is due the plaintiffs and the members of the class they represent an amount equal to double the unpaid wages, which amount is Eighty Thousand Dollars, ($80,000.00);

11. That defendant corporation is in iminent danger of insolvency and has in fact discontinued many of its operations in this State; and that defendant has transferred many of its assets to the Mimosa Corporation in South Carolina and beyond the jurisdiction of the Indiana Courts; that defendant's assets remaining in the jurisdiction of the Indiana Courts are now advertised for sale; that all security for the protection of these plaintiffs' liens for wages is in danger of dissipation and distribution; that unless said remaining assets are impounded or otherwise protected from dissipation and distribution, the plaintiffs herein and all the members of the class represented by them will be prevented from achieving any practical satisfaction of their claims;

12. That it will be to the best interests of plaintiffs and the members of the class which they represent and all creditors of the defendant corporation to have a receiver appointed for said defendant corporation to conduct and carry on the business of said defendant corporation and to preserve and distribute the assets thereof;

13. That the defendant corporation is now threatened with a multiplicity of law suits and plaintiffs and the members of the class which they represent have no adequate remedy at law.

WHEREFORE, the plaintiffs ask for judgment against the defendant corporation in the amount of Forty Thousand Dollars, ($40,000.00), with liquidated damages in the amount of Eighty Thousand Dollars, ($80,000.00), together with a reasonable fee for plaintiffs' attorney, that the plaintiff recover costs of the defendant, and further asks that this Court appoint a receiver for the property and assets of the said defendant corporation with the usual powers and authority conferred upon a receiver in such cases and that

this Court order that this matter be set down for hearing for the appointment of a receiver and for all other relief right and proper.

S/Lynnville G. Miles and Daniel F. Cummings,
Attorneys for Plaintiffs.

Vanderburgh Superior Court, Filed Mar. 18, 1960,
s/ Bert Reed, Clerk.

IN THE SUPERIOR COURT OF VANDERBURGH COUNTY

Cause No. C-7824

STATE OF INDIANA,
County of Vanderburgh, ss:

KENNETH H. JOHNSON, RAYMOND F. FALLEN, JUANITA M. MILLER, DELORES ESTHER SCHMIDT, BERTHA COLBERN, NORMAN HOOE, WALTER DUNN, WILLIE H. SCHNEIDER, AS INDIVIDUALS AND AS REPRESENTATIVES OF A CLASS, *Plaintiffs*,

vs.

HOOSIER CARDINAL CORPORATION, *Defendant*

THIRD AMENDED COMPLAINT

Come now the plaintiffs, for themselves and others similarly situated, the members of a class who are very numerous, being more than One Hundred in number, and for cause of action state:

1. That the defendant is a corporation incorporated under the laws of the State of Indiana;

2. That each and all the named plaintiffs and each and all the members of the class which these named plaintiffs represent have been employees of the defendant corporation prior to the commencement of this action; that the question presented in this complaint is of common interest to all members of the aforesaid class; that the members of said class are numerous, being more than One Hundred in number and it is impracticable to bring them all before the Court; that the named plaintiffs fairly represent the interests and rights of this class and this Court can adjudicate the rights of all the members of this class fairly and justly in this action and through these representatives;

3. That on or about the 1st day of September, 1955 the plaintiffs by their collective bargaining representative,

United Automobile, Aircraft and Agricultural Implement Workers and Local 135 thereof and the defendant corporation by its officers, entered into an agreement, a copy of which is filed herewith and made a part of this complaint and is marked "Plaintiffs' Exhibit 1";

4. That the claim of each of the plaintiffs and of each member of the plaintiffs' class arises from and out of the breach of the collective bargaining contract described as "Plantiffs' Exhibit 1";

5. That as part of the compensation of said employees, Article VIII of said agreement provides: "Vacation pay shall be granted on the following basis:

a. Each hourly rated employee—shall be entitled to Forty (40) hours vacation with pay;
c. Each hourly rated employee (with 3-10 years service) shall be entitled to Eighty (80) hours vacation with pay.
d. Each hourly rated employee (who has more than Ten years service) shall be entitled to One Hundred Twenty (120) hours vacation with pay."

The aforesaid article further provides that all employees who have either worked at least 1000 hours during the preceeding twelve months or who have certain seniority rights as described in Article VIII shall be guaranteed vacation pay; that said vacation pay is to be based on the average wages of each employee during the preceeding twelve months;

6. That prior to the 1st of June, 1957, and since the 1st of January, 1957, the named plaintiffs and each member of the class of said former employees which said plaintiffs represent have earned vacation pay according to said Article VIII in varying amounts all as shown in Plaintiff's Exhibit 2, which is now filed and made a part of this complaint;

7. That on or about the 1st day of June, 1957, defendant discontinued the employment of the named plaintiffs and the employment of all the members of the class which said employees represented, but defendant has

consistently refused to pay over to said plaintiffs or to any members of the class represented herein any of the accumulated and accrued vacation pay which is now due and owing;

8. That the pay records of plaintiffs and each member of the class represented herein are in the possession and control of the defendant; that plaintiffs have no access to said records;

9. That plaintiffs and the members of the class herein are without accurate records to determine the exact amount or amounts of vacation pay which they have earned from said defendant; that according to their knowledge and belief, said vacation pay now owing to all the plaintiffs and the members of the class is in the amount of Forty Thousand Dollars ($40,000.00), all as shown by Plaintiffs' Exhibit 2;

10. That pursuant to the Acts of the General Assembly of the State of Indiana for the year 1911, Chapter 68, Sections 1 and 4 thereof, in accordance with the Acts of the General Assembly for the year 1933, Chapter 47, Section 2, there is due the plaintiffs and the members of the class they represent an amount equal to double the unpaid vacation pay, which amount is Eighty Thousand Dollars ($80,000.00);

11. That defendant corporation is in imminent danger of insolvency and has in fact discontinued many of its operations in this State; and that defendant has transferred many of its assets to the Mimosa Corporation in South Carolina and beyond the jurisdiction of the Indiana Courts; that defendant's assets remaining in the jurisdiction of the Indiana Courts are now advertised for sale; that all security for the protection of these plaintiffs' liens for wages is in danger of dissipation and distribution; that unless said remaining assets are impounded or otherwise protected from dissipation and distribution, the plaintiffs herein and all the members of the class represented by them will be prevented from achieving any practical satisfaction of their claims;

12. That it will be to the best interests of plaintiffs and the members of the class which they represent and all creditors of the defendant corporation to have a receiver

appointed for said defendant corporation to conduct and carry on the business of said defendant corporation and to preserve and distribute the assets thereof;

13. That the defendant corporation is now threatened with a multiplicity of law suits and plaintiffs and the members of the class which they represent have no adequate remedy at law.

WHEREFORE, the plaintiffs ask for judgment against the defendant corporation in the amount of Forty Thousand Dollars ($40,000.00) with liquidated damages in the amount of Eighty Thousand Dollars ($80,000.00) together with a reasonable fee for plaintiffs' attorney, that the plaintiff recover costs of the defendant, and further asks that this Court appoint a receiver for the property and assets of the said defendant corporation with the usual powers and authority conferred upon a receiver in such cases and that this Court order that this matter be set down for hearing for the appointment of a receiver and for all other relief right and proper.

S/ LYNNVILLE G. MILES,
LYNNVILLE G. MILES.

S/ DANIEL F. CUMMINGS,
DANIEL F. CUMMINGS,
Attorneys for Plaintiffs.

Vanderburgh Superior Court, Filed Apr. 20, 1960,
Bert Reed, Clerk.

IN THE SUPERIOR COURT OF VANDERBURGH COUNTY

Cause No. C-7824

STATE OF INDIANA,
County of Vanderburgh, ss:

KENNETH H. JOHNSON, RAYMOND F. FALLEN, JUANITA M. MILLER, DELORES ESTHER SCHMIDT, BERTHA COLBERN, NORMAN HOOE, WALTER DUNN, WILLIE H. SCHNEIDER, AS INDIVIDUALS AND AS REPRESENTATIVES OF A CLASS, *Plaintiffs*,

vs.

HOOSIER CARDINAL CORPORATION, *Defendant*

DEMURRER TO PLAINTIFFS' THIRD AMENDED COMPLAINT

The defendant, Hoosier Cardinal Corporation, for its demurrer to plaintiffs' third amended complaint herein, demurs to said third amended complaint and for ground of demurrer says:

1. That plaintiffs' third amended complaint herein does not state facts sufficient to constitute a cause of action against the defendant, Hoosier Cardinal Corporation.

KAHN, DEES, DONOVAN, KAHN & SHRODE

By————

MEMORANDUM

1. The third amended complaint shows on its face that it is brought by eight (8) named individuals joining together as plaintiffs and seeking as (a) individuals, and (b) representatives, of a class composed of former employees of the defendant numbering more than one hundred.

2. In order to withstand a challenge by demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action, the third amended complaint must allege a cause of action either in (a) the eight named individual plaintiffs as having a united or general interest among them which could be established by the same evidence, or (b) the eight named plaintiffs as representatives of the class and having a united, common or general interest with the unnamed members of the class which could be established by the same evidence.

3. The third amended complaint shows on its face that it does not state a cause of action against the defendant in favor of the named plaintiffs individually or as representatives of the unnamed members of the class because there is no showing of a united interest either among the named eight plaintiffs or among the named eight plaintiffs and the unnamed members of the class. The detailed reasons follow.

4. The only remedy now sought in this action is money damages. The demand that a Receiver be appointed herein was tried by this Honorable Court and resulted in a finding and judgment in favor of the defendant.

5. It appears from the third amended complaint that a collective bargaining agreement was executed between the defendant and a labor union which represented its employees for collective bargaining purposes and that a copy of said agreement, marked "Plaintiffs' Exhibit 1", is attached to and made a part of said complaint. It further appears that Forty Thousand Dollars ($40,000.00) of the money damages demanded by the third amended complaint is alleged to be for unpaid vacation pay. It also appears on the face of said third amended complaint that the balance of the money damages demanded are for liquidated damages for failure to pay said vacation pay. The third amended com-

plaint does not allege the amount of vacation pay and damages which each named plaintiff and each member of the class are seeking to recover.

6. It appears from said third amended complaint that the amount of money to which each member of the class and each individual plaintiff is entitled to depends upon his seniority (length of service with the defendant), his rate of pay, the number of hours worked by him during the twelve (12) months preceding the vacation period and the average earnings during the preceding year of each member of the class and of each individual plaintiff.

7. The third amended complaint shows on its face that the named plaintiffs, if they are entitled to vacation pay, may be entitled to recover different amounts. Each of the named plaintiffs would have his individual seniority rights and no two may be the same. Each of the named plaintiffs would have his individual rate of pay and average earnings and no two may be the same. Each named plaintiff would have his individual record on the number of hours worked during the twelve (12) months preceding the vacation period and no two may be the same. There is no question common to them and no issue which affects all of the named plaintiffs alike. None of the named plaintiffs are united in interest with any of the other named plaintiffs and there is no question of common or general interest among them which could be established by the same evidence. Joint trial of their several causes of action would not be possible because each named plaintiff has his own different individual cause of action. Each named plaintiff seeks to recover for himself or herself and it cannot make any difference to him or her what any other named plaintiff recovers.

8. The third amended complaint shows on its face that the unnamed members of the class, if they are entitled to vacation pay, may be entitled to recover different amounts. Each of the unnamed members of the class would have his individual seniority rights and no two may be the same. Each of the unnamed members of the class would have his individual rate of pay and average earnings and no two may be the same. Each of the unnamed members of the

class would have his individual record on the number of hours worked during the twelve (12) months preceding the vacation period and no two may be the same. There is no question common to them and no issue which affects any of the unnamed members of the class and any of the named plaintiffs alike. None of the unnamed members of the class or named plaintiffs are united in interest with any of the other unnamed members of the class or the named plaintiffs and there is no question of common or general interest among them which could be established by the same evidence. Joint trial of their several causes of action would not be possible because each unnamed member of the class and each named plaintiff has his own different individual cause of action. Each unnamed member of the class and each named plaintiff seeks to recover for himself or herself and it cannot make any difference to him or her what any other unnamed member of the class or named plaintiff recovers.

An oral argument is respectfully requested.

KAHN, DEES, DONOVAN, KAHN & SHRODE,

By _____

Attorneys for Defendant.

The undersigned certifies that he delivered copies of the above and foregoing demurrer and memorandum to Sydney L. Berger, one of the attorneys for the plaintiffs, this 20th day of April, 1960.

_____

ENTRY for May 4, 1960

C-7824

IN RE: JOHNSON, ET AL,

v.

HOOSIER CARDINAL CORPORATION

And the plaintiffs, failing and refusing to amend their complaint or plead further, abide said ruling, and the Court renders judgment on the demurrer to the third amended complaint.

IT IS, THEREFORE, CONSIDERED AND ADJUDGED by the Court that the plaintiffs take nothing by this action and that the defendant recover of the plaintiffs, its costs and charges in this cause paid, laid out and expended.

/s/ A. DALE EBY,
Special Judge,
Superior Court of Vanderburgh County.

Vanderburgh Superior Court, Filed Jun 3, 1960, s/ Bert Reed, Clerk

IN THE SUPERIOR COURT OF VANDERBURGH COUNTY

Cause No. C-7824

STATE OF INDIANA,
County of Vanderburgh, ss:

KENNETH H. JOHNSON, RAYMOND F. FALLEN, JUANITA M. MILLER, DELORES ESTHER SCHMIDT, BERTHA COLBERN, NORMAN HOOE, WALTER DUNN, WILLIE H. SCHNEIDER, AS INDIVIDUALS AND AS REPRESENTATIVES OF A CLASS, *Plaintiffs*,

vs.

HOOSIER CARDINAL CORPORATION, *Defendant*

ENTRY AND DECREE

And the plaintiffs, failing and refusing to amend their complaint or plead further, abide said ruling, and the Court renders judgment on the demurrer to the third amended complaint.

IT IS, THEREFORE, CONSIDERED AND ADJUDGED by the Court that the plaintiffs take nothing by this action and that the defendant recover of the plaintiffs, its costs and charges in this cause paid, laid out and expended.

s/ A. DALE EBY,
Special Judge,
Superior Court of Vanderburgh County.

Dated this *3rd* day of *June*, 1960.